



SECTION 3(5)(i) OF THE COMPETITION ACT – AN ANALYSIS

—Paramjeet Berwal

Bad laws are the worst sort of tyranny.

—Edmund Burke (1729-1797)

There is economy.¹ There are people.² There are conflicting interests and priorities.³ Then, there is competition in the system.⁴ Law is the only tool in the hands of the *state* to manufacture and sustain any system.⁵

With the *Kataria*⁶ judgment rendered by the Competition Commission of India interpreting some of the most important aspects relating to Section 3(5) (i) of the Competition Act, it is crucial for the different stakeholders to analyse this decision, which would affect competition, innovation and consumer welfare. The aim of this article is to analyse and understand the scope and the nature of

¹ Karl Marx referred to the economic structure of the society as the real foundation on which legal and political superstructure arises. Karl Marx, *Preface to A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY* (Moscow, Progress Publishers Moscow 1977).

² Karl Marx, *Critique of Hegel's Philosophy in General*, in *ECONOMIC AND PHILOSOPHICAL MANUSCRIPT OF 1844* ("That is to say, the objects of his [man's] instincts exist outside him, as objects independent of him; yet these objects are objects that he needs – essential objects, indispensable to the manifestation and confirmation of his essential powers."); In order to understand the contemporary change in human behavior, see Robert D. Putman, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (New York, Simon and Schuster 2000).

³ Friedrich Engels, *Ludwig Feuerbach And The End Of Classical German Philosophy*, 4 & 5 *Die Neue Zeit* part 4, (1886) ("That which is willed happens but rarely; in the majority of instances the numerous desired ends cross and conflict with one another, or these ends themselves are from the outset incapable of realisation, or the means of attaining them are insufficient. Thus the conflict of innumerable individual wills and individual actions in the domain of history produce a state of affairs entirely analogous to that prevailing in the realm of unconscious nature.").

⁴ See John Bellamy Foster, Robert W. McChesney and R. Jamil Jonna, *Monopoly and Competition in the Twenty-First Century Capitalism*, 62(11) *MONTHLY REVIEW* (April, 2011); see also Maurice E. Stucke, *Is Competition Always Good?*, 1(1) *J. ANTITRUST ENFORCEMENT* 162,162 (2013).

⁵ Though, recently, the studies have proved that it really is the economically affluent people who influence the law-making. See Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12(03) *Perspectives on Politics*, 564, 575-577 (2014).

⁶ *Shamsher Kataria*, *In re*, 2014 SCC OnLine CCI 95 ("Kataria").

relationship between Intellectual Property and Competition Law from a purely legal perspective entailing economic and social dimensions. It discusses questions arising in relation to the interpretation of Section 3(5)(i) of the Competition Act; the interpretation afforded to the same by the Competition Commission; and other possible permutations and combinations that might serve the purpose behind the enactment of the said provision.

I. INTRODUCTION

Prof. John F. Duffy⁷ claims that competition law structures intellectual property rights.⁸ Whereas, the Competition Commission of India (henceforth referred to as “CCI”) has maintained that intellectual property rights lessen competition.⁹ The legislation does provide a mechanism to achieve the purpose set therein.¹⁰ The application of competition law to the cases, predominantly, pertaining to intellectual property rights is considered to be an extremely complicated and critical issue of competition policy.¹¹ This, perhaps, is the reason that, entrusted with the responsibility of formulating National IPR Policy, the IPR Think-Tank of India has listed IP interface with Competition law and policy in the important areas of study and research for future policy developments.¹² The Committee for framing the National Competition Policy of India also enlists intellectual property laws as having one of the most important interfaces with the competition.¹³ Competition and intellectual property rights are very distinct issues, yet they form very intrinsic aspects of an economic system which is controlled by certain laws.¹⁴

⁷ Prof. John F. Duffy is Samuel H. McCoy Professor of Law and Armistead M. Dobie Professor of Law, University of Virginia School of Law.

⁸ John F. Duffy’s comments at National Lawyers Convention organized by The Intellectual Property Practice Group of The Federalist Society for Law and Public Policy Studies, November 14, 2013, YouTube (Nov. 15, 2013) <https://www.youtube.com/watch?v=TmBJknoGKSM>; see also Shubha Ghosh, *Intellectual Property Law and Competition*, International Scholars Conference on Intellectual Property Law, University of Wisconsin Law School, 16-17th September, 2014.

⁹ Competition Commission of India, Advocacy Booklet, *Intellectual Property Rights Under the Competition Act, 2002*.”

¹⁰ Paramjeet Singh Berwal, *Articles 3(a) and 3(b) of the SPC Regulation - An Analysis*, 36(1) EUROPEAN INTELLECTUAL PROPERTY REVIEW, 29, 33 (2014).

¹¹ JOSEPH DREXL, RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND COMPETITION LAW (Edward Elgar Publishing Limited, 2008); Jaouin Almunia, Vice President, European Commission Responsible for the Competition Policy, Speech at the IP Summit, Paris: Intellectual Property and Competition Policy (Dec. 9, 2013).

¹² National IPR Policy submitted by IPR Think Tank, First Draft, at p. 23, (19th December 2014).

¹³ Draft National Competition Policy Statement of India- 2011, drafted by the Committee constituted by the Ministry of Corporate Affairs.

¹⁴ This is true even in the case of ‘free-market economy’ because there is no such thing as a free market. In fact, this is the very first truth Ha Joon Chang, Reader in the Political Economy of Development at Cambridge University, reveals in one of his books. He writes that every market has some rules and government is always involved. Ha-Joon Chang, 23 THINGS THEY DON’T TELL YOU ABOUT CAPITALISM (Allen Lane ed., London, Penguin, 2010).

II. INTELLECTUAL PROPERTY – *MEANING AND PURPOSE*

According to WIPO, “[I]ntellectual Property (IP) refers to creations of the mind, such as inventions; literary and artistic works; design; and symbols, names and images used in commerce.”¹⁵

The concerned international organisations highlight the purpose of IPRs as private economic benefits accruing to IPR holders¹⁶. WIPO states that “[I]ntellectual property rights are like any other property right. They allow creators, or owners, of patents, trademarks or copyrighted works to benefit from their own work or investment in creation. These rights are outlined in Article 27 of the Universal Declaration of Human Rights, which provides for the right to benefit from the protection of moral and material interests resulting from authorship of scientific, literary or artistic productions.”¹⁷ Per the WTO, “they usually give the creator an exclusive right over the use of his/her creation for a certain period of time.”¹⁸ According to OECD, “[T]hese property rights allow the holder to exercise a monopoly on the use of the item for a specified period. By restricting imitation and duplication, monopoly power is conferred, but the social costs of monopoly may be¹⁹ offset by the social benefits of higher level of creative activity encouraged by monopoly earnings.”²⁰ They are the rewards that an individual get for his efforts.²¹

¹⁵ WIPO, <http://www.wipo.int/about-ip/en/>.

¹⁶ IP holders can include people and corporations. However, corporations hold more IPRs than people do. See 1 Wenche Barth Eide (Ed.) & Uwe Kracht (Ed.), *FOOD AND HUMAN RIGHTS IN DEVELOPMENT - LEGAL AND INSTITUTIONAL DIMENSIONS AND SELECTED TOPICS* 434 (Intersentia 2005).

¹⁷ *What is Intellectual Property?*, WIPO, available at http://www.wipo.int/edocs/pubdocs/en/int-property/450/wipo_pub_450.pdf.

¹⁸ WTO, https://www.wto.org/english/tratop_e/trips_e/intell_e.htm.

¹⁹ The phrase ‘may be’ is very crucial in the context of understanding the importance of IPRs in serving a larger interest, directly or indirectly.

²⁰ R.S. Khemani & D.M. Shapiro, *Glossary of Industrial Organisation Economics and Competition Law*, commissioned by the Directorate for Financial, Fiscal and Enterprise Affairs, OECD (1993).

²¹ Cf. Justin Huges, *The Philosophy of Intellectual Property Rights*, 77 *GEORGETOWN LAW JOURNAL* 287 (1988) (citing, *Zacchini v. Scripps-Howard Broadcasting Co.*, 53 L Ed 2d 965 : 433 US 562, 576 (1977) “The protection [of publicity] provides an economic incentive . . . to make the investment required to produce a performance. . . . This same consideration underlies the patent and copyright laws long enforced by this Court.”; *Goldstein v. California*, 37 L Ed 2d 163 : 412 US 546, 555 (1973) “to encourage people to devote themselves to intellectual and artistic creation, Congress may guarantee to authors and inventors a reward”; cf. *United States v. Paramount Pictures Loew’s*, 92 L Ed 1260 : 334 US 131, 158 (1948) “It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius.”).

IPRs are private rights.²² The business houses across the world are increasingly becoming dependent on IPRs for profit-making.²³ Though many claim that IPRs act as incentive to innovate²⁴, others say that they are merely a tool to commercialise the innovation that would have been there, sooner or later, even if there were no IPRs.²⁵ It is also often said that IPRs are ultimately directed towards the welfare of consumers.²⁶ Theories should be tested by the utilities they afford in explaining the practical situations occurring in reality.²⁷

III. COMPETITION LAW - MEANING AND PURPOSE

“Competition law provides the framework for competitive activity. It protects the process of competition.”²⁸ The concept of competition in the market is considered valuable and, therefore, worthy of being protected.²⁹ It is argued that competition in international and domestic markets provides an impetus to efficiency and productivity by letting survive and sustain only those firms that are better than the others in terms of catering to the demands of the market.³⁰ The competition law seeks to protect competition in the market encouraging innovation³¹ and promoting price competition^{32, 33}. Consumer welfare and protection is considered to be the goal of the competition law.³⁴

²² Keith Eugene Maskus, PRIVATE RIGHTS AND PUBLIC PROBLEMS: THE GLOBAL ECONOMICS OF INTELLECTUAL PROPERTY IN 21ST CENTURY (Washington, DC, Peterson Institute Press 2012); LTC Harms, *The Enforcement of Intellectual Property Rights: A Case Book*, (WIPO, 3rd ed. 2012); Christopher May, A GLOBAL POLITICAL ECONOMY OF INTELLECTUAL PROPERTY RIGHTS- THE NEW ENCLOSURES? (London, Routledge 2000).

²³ William W. Fisher, *Theories of Intellectual Property*, NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY (Cambridge University Press 2001).

²⁴ Sunil Kanwar and Robert E. Evenson, *Does Intellectual Property Protection Spur Technological Change?*, Center Discussion Paper No. 831, Economic Growth Center, Yale University, at p. 18 (June 2001) available at http://www.econ.yale.edu/growth_pdf/cdp831.pdf.

²⁵ *See Innovation and Growth – Rationale for an Innovation Strategy*, OECD, 10 (2007).

²⁶ Pamela Samuelson & Suzanne Scotchmer, *The Law and Economics of Reverse Engineering*, 111 YALE LAW JOURNAL 1575 (2002).

²⁷ *See* Richard A. Posner, ECONOMIC ANALYSIS OF LAW (Aspen, 8th ed, 2011).

²⁸ Competition Bill (H.L.), H L Deb October 30, 1997, Volume 582 Column 1156.

²⁹ Sandra Marco Colino, INTRODUCTION TO COMPETITION LAW (Oxford University Press, 7th ed. 2011).

³⁰ Klaus Schwab, THE GLOBAL COMPETITIVENESS REPORT 2014-15 (World Economic Forum 2014).

³¹ This is called ‘dynamic competition’.

³² This is called ‘static competition’.

³³ Richard Whish, COMPETITION LAW (London, LexisNexis UK, 5th edn. 2003) 734; Thomas Dreier, *Balancing Proprietary and Public domain Interests: Inside or Outside of Proprietary Rights?*, EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY (Rochelle, Cooper, Dreyfuss, et al eds. 2001) 312; Herbert Hovenkamp, *et al*, IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW (New York, Aspen Law & Business, 2002).

³⁴ *See* Bork, R.H. (1978), *The Antitrust Paradox: A policy at War with Itself*, Basic Books; Posner, R.A. (2001), *Antitrust Law*, University of Chicago Press, 2nd edition; *Competition Policy and Law in the Consumer and Development Interest*, Dr. S. Sothi Rachagan, United nations Conference on Trade and Development 2-4 July 2003 p. 4 <http://www.cid.harvard.edu/cidtrade/Papers/sothi.pdf> ; *Some Reflections on the Question of Goals of EU Competition Law*, Ioannis Lianos, January 2013, Centre for Law Economics and Society Working Paper Series, 3/2013; *On the Choice of*

Generally, this, that the IPRs and Competition law seek to achieve consumer welfare, is what the mainstream organisation and experts around the world propose.³⁵ IPRs act as an incentive to innovate and, thereafter, cause their dissemination and commercialization.³⁶ On the other hand, competition laws promote innovation and consumer welfare by prohibiting anti-competitive practices with regard to the existing and the new ways of serving consumers.³⁷ However, the text that immediately follows the definitions of IPRs as provided by various international organizations like WIPO, WTO, OECD etc.³⁸ clearly highlights economic or financial significance of IPRs for the IPR holders and not for the consumers. In the absence of any strong evidence³⁹, attributing consumer welfare⁴⁰ to IPRs can be said to be merely a distorted hindsight approach in a desperate attempt to justify IPRs in the context of overall consumer welfare.⁴¹

IV. THE RELATIONSHIP

Competition law is a legal framework of market supervision that seeks to correct the problem of monopoly which is one kind of a market failure.⁴² On the other hand, IPRs grant monopoly rights to the IPR holders.⁴³ Earlier it was

Welfare Standards in the Competition Law, Louis Kaplow, Discussion Paper No. 693, Harvard Law School May 2011.

³⁵ See Arutyun Arutyunyan, *Intellectual Property Law vs. Essential Facility Doctrine. Microsoft vs. Commission*, BALITIC JOURNAL OF EUROPEAN STUDIES (earlier known as the Proceedings of the Institute for European Studies), IES Proceedings, No. 4 (December 2008), Socio-Economic and Institutional Environment: Harmonisation in the EU Countries of Baltic Sea Rim.

³⁶ U.S. Department of Justice and Federal Trade Commission Antitrust Guidelines for the Licensing of Intellectual Property (1995), reprinted in 4 Trade Reg. Rep. (CCH); also see United Nation Economic Commission for Europe; Intellectual Property Commercialisation – Policy Options and Practical Instruments 2011 esp. p. 6.

³⁷ U.S. Department of Justice and Federal Trade Commission Antitrust Guidelines for the Licensing of Intellectual Property (1995), reprinted in 4 Trade Reg. Rep. (CCH).

³⁸ Refer to the discussion under the heading “Intellectual Property – meaning and purpose” of this article.

³⁹ See Carlos M. Correa, *Intellectual Property and Competition Law: Exploration of Some Issues of Relevance to Developing Countries*, ICTSD IPRs and Sustainable Development Programme Issue Paper No. 21, International Centre for Trade and Sustainable Development, Geneva, Switzerland, at p. viii.

⁴⁰ For more information about the realities of IPRs, read Joseph Stiglitz, *Economic Foundations of Intellectual Property Rights*, 57 DUKE LAW JOURNAL 1693 (2008).

⁴¹ To know more about the basics of such issues, see Doron Teichman, *The Hindsight Bias and the Law in the Hindsight*, in THE OXFORD HANDBOOK OF THE BEHAVIORAL ECONOMICS AND THE LAW, 354-376 (Eyal Zamir & Doron Teichman eds., Oxford University Press 2014); see also Ellsworth, Phoebe C., *Legal Reasoning and Scientific Reasoning*, 63(1) ALABAMA LAW REVIEW, 895 (2011).

⁴² Niamh Dunne, COMPETITION LAW AND ECONOMIC REGULATION – MAKING AND MANAGING MARKETS 14 (Cambridge University Press, 2015).

⁴³ See Roger E. Meiners & Robert J. Staaf, *Patents, Copyrights, and Trademarks: Property or Monopoly?* 13(3) HARVARD JOURNAL OF LAW & PUBLIC POLICY 911, 911 (1990); N. Stephan Kinsella, AGAINST INTELLECTUAL MONOPOLY 6 (Ludwog von Mises Institute, 2008); Steven Shavell and Tanguy Van Ypersel, *Abstract to Rewards vs. Intellectual Property Rights*, 44 JOURNAL OF LAW AND ECONOMICS 525 (2001); for another point of view, see John F. Duffy, *Intellectual Property*

believed that the two disciplines operate against each other.⁴⁴ But the perception is considered to have changed now with a prevailing mindset that the goals of competition law and intellectual property are similar.⁴⁵ But the pseudo-shift in the academic discourse is a common consequence of the conditioning of the academia by the existing power structures.⁴⁶ There is one school of thought that seeks to separate the competition law from the intellectual property law and maintains that the job of the competition law should only be limited to the “use and abuse of property rights that are sources of monopoly power”⁴⁷.

An argument is often advanced against subjecting the IPRs to competition scrutiny that it will undermine the very certainty of the exclusivity that intellectual property rights aim to provide in order to stimulate innovation.⁴⁸ The protection of IPRs from the onslaught of competition law presumes the relevance of IPRs in stimulating innovation that is considered to be the best for the public. Recouping of investment is helped by IP regime and therefore, firms are incentivized to innovate.⁴⁹ The veracity of this argument has to be tested through the sieve of the obscenities of truth. It is argued that innovation has been and will always be there irrespective of the existence of IPRs.⁵⁰ There exist contradictory approaches in this regard.⁵¹ These different approaches not only create confusions

as Natural Monopoly: Towards a General Theory of Partial Property Rights, Paper at Fall 2004 Workshop of the Center of Law, Business, and Economics of the University of Texas.

⁴⁴ See, eg, *Image Technical Services, Inc. v. Eastman Kodak Co.*, 125 F 3d 1195, 1215 (9th Cir 1997) (“[o]ne body of law creates and protects monopoly power while the other seeks to proscribe it.”).

⁴⁵ *Atari Games Corp. v. Nintendo of America Inc.*, 897 F 2d 1572 (Fed. Cir. 1990); Thomas C. Vinje and Ashwin van Rooijen, *Chapter 17: The Relationship between Intellectual Property Rights and Competition Laws*, in *OVERLAPPING INTELLECTUAL PROPERTY RIGHTS* 368 (Neil Wilkof & Shannad Basheer eds., Oxford University Press 2012); *The competition law/IP ‘interface’- an introductory note*, in *THE INTERFACE BETWEEN INTELLECTUAL PROPERTY RIGHTS AND COMPETITION POLICY 1* (Steven D Anderman ed., Cambridge University Press 2007); William K Tom & Joshua A. Newberg, *Antitrust and Intellectual Property: From Separate Spheres to Unified Field*, 66 *ANTITRUST LAW JOURNAL* 167, 167 (1997); Mark A. Lemley, *A New balance between IP and Antitrust*, 13 *SOUTHWESTERN JOURNAL OF LAW AND TRADE IN THE AMERICAS* 237 (2007).

⁴⁶ See Interview with Ha Joon Chang, Reader, University of Cambridge, *Old economics, new stirrings*, *FRONTLINE* (March 6, 2015).

⁴⁷ Pierre Regibeau & Katherine Rockett, *The Relationship Between Intellectual Property Law and Competition Law: An Economic Approach*, Discussion Paper, University of Essex and CEPR (June 2014).

⁴⁸ See Ashwin van Rooijen, *THE SOFT WARE INTERFACE BETWEEN COPYRIGHT AND COMPETITION LAWS*, 104 (Kluwer Law International, 2010).

⁴⁹ Commission Notice Guidelines on the application of the Article 81 of the EC Treaty to technology transfer agreements, European Commission, 7 Section Official Journal C-101/2 (2004).

⁵⁰ Friedrich A. Hayck, *THE FATAL CONCEIT- THE ERRORS OF SOCIALISM* 6 (W.W. Bartely, 3rd ed., Chicago, University of Chicago press, 1991); see Robert P. Merges and Richard R. Nelson, *On the Complex Economics of Patent Scope*, 90 *COLUMBIA LAW REVIEW* 839; S.N.S. Cheung, *Property Rights and Invention*, 8 *Res. L. & Econ.* 5, 6 (1986) (referring to F.W. Taussig, *Inventors and Money-Makers* (1930)); see generally Rochelle Dreyfuss & Susy Frankel, *From Incentive to Commodity to Asset: How International Law is Reconceptualizing Intellectual Property* (New York University Public Law and Legal Theory Working Papers- 478, 2014).

⁵¹ Pdraig Dixon & Christine Greenhalgh, *The Economics of Intellectual Property: A Review to Identify Themes for Future Research*, at p. 31, University of Oxford, Discussion Paper Serious

as to the real understanding of the issue from an unbiased point of view, they enrich the public discourse by making available plethora of perspectives.

V. INTERFACE BETWEEN THE IP AND COMPETITION LAW- *GIVING IT A SHAPE*

In the Indian context, as is everywhere else in the world, any philosophical conundrum is put an end to, at least, in the realm of justice dispensation system, the moment a piece of legislation on the subject comes into the picture. The same happened with the controversies that arose from the interaction between competition policy and IPRs when many countries around the world passed laws pertaining to the competition law.⁵² However, thereafter, further problems of interpretation of the law started to crop up.⁵³ Though the broader question is “whether and under which conditions the granting of IP protection may be limited, or whether an appropriate market regime- in the light of pursuing innovation- could be established on the basis of competition law”⁵⁴, the relationship between the two and the formal protocol governing the same have been concretised by Section 3(5)(i) of the Competition Act. Regardless, it is crucial to understand the nature and the scope of this relationship as has come to be defined by the statute.⁵⁵

In a common law country that India is, it becomes important to take into account the apprehensions that attach to any exercise of interpretation⁵⁶ undertaken by the courts, especially when the laws hailing from different disciplines come into conflict with each other at the time of their application. The significance of the dilemma intensifies in the absence of any formal hierarchy in the legal statutory structure.⁵⁷ It is very difficult to say whether Competition Law will prevail over IP law or vice-versa; and, how will the competition law deal

No. 135 (December 2002).

⁵² R. Shyam Khemani, *Application of Competition Law: Exemptions and Exemptions*, UNCTAD/DITC/CLP/Misc.25 (United Nations, 2002); For an overview of the competition laws around the world, see Keith N. Hylton & Fei Deng, *Antitrust Around the World: An Empirical Analysis of the Scope of Competition Laws and Their Effect*, 74(2) ANTITRUST LAW JOURNAL 271 (2007).

⁵³ Roger van den Bergh & Peter D. Camesasca, EUROPEAN COMPETITIVE LAW AND ECONOMICS: A COMPARATIVE PERSPECTIVE 70 (London, Sweet & Maxwell, 2nd ed. 2006).

⁵⁴ Max Planck Institute for Innovation and Competition, *Intellectual property law and competition law- between the market place and the regulation*, http://www.ip.mpg.de/en/pub/research_teaching/ip/fields_of_research/marketplace_and_regulation.cfm#i26297.

⁵⁵ See Jens Schovsbo, *Fire and Water Make Steam- redefining the role of competition law in TRIPS*, INTELLECTUAL PROPERTY RIGHTS IN A FAIR WORLD TRADE SYSTEM (Annette Kur ed., Edward Elgar Publication, 2011).

⁵⁶ Lord Selborne, L.C., in *Giles v. Melsom*, 1873 LRHL Eng. Ir. App. 24, said that “that nothing can be more mischievous than the attempt to wrest words from their proper and legal meaning, only because they are superfluous”.

⁵⁷ Grosse Ruse-Khan, Henning, *Introduction to A Conflict-of laws Approach to Competing Rationalities in International Law: The Case of Plain Packaging between IP, Trade, Investment and Health*, 9 JOURNAL OF PRIVATE INTERNATIONAL LAW 309, 309 (2013).

with IP issues.⁵⁸ The Competition Commission of India (henceforth referred to as “CCI”) in *Shamsher Kataria, In re*⁵⁹ did deal with the interpretation of Section 3(5)(i) of the Competition Act. The following discussion will conclude into whether the way CCI dealt with the issue clarified the situation or obscured it further and that too in a wrong direction.

VI. SECTION 3(5)(I) OF THE COMPETITION ACT

Regardless of the fact that IP regimes should not be conceived and applied in isolation to the competition law⁶⁰, the existing IP laws do not protect competition. There is an argument that IP law promotes dynamic competition.⁶¹ But, doubts do exist whether IPRs should take all the credit for being the champion of dynamic competition.⁶²

There is absolutely no reference to the term “competition” in the India IP statutes. But, the competition law statute provides certain exemptions to protect the IPRs.⁶³ Any person who wants to go ahead with restraining someone else from infringing his IPRs or with imposing certain restriction in order to protect his IPRs under the Indian statutes has been given a free pass under the Competition Act. This implies that the overall mandate of the legal system is biased in favour of IPRs that are private rights, at the cost of competition law, the most desired general market phenomenon.⁶⁴ Therefore, the objectives that are sought to be served by the application of IPR laws are given preference and priority over the objectives that are sought to be served by the application of competition law.

Section 3(5)(i) of the Act reads as follows:

⁵⁸ See Copyright, Competition and Development, A Report By Max Planck Institute for Intellectual Property and Competition Law, Munich, at p. 6 (December 2013), http://www.ip.mpg.de/files/pdf3/Report_Copyright-Competition-Development_December-2013.pdf.

⁵⁹ *Shamsher Kataria, In re*, 2014 SCC OnLine CCI 95.

⁶⁰ Carlos Correa, *A Competition Approach to the Intellectual Property Protection*, International Center for Trade and Development (November 1, 2007) available at <http://www.ictsd.org/bridges-news/bridges/news/a-competition-approach-to-intellectual-property-protection>.

⁶¹ Josef Drexel, *Intellectual Property and Antitrust Law- IMS Health and Trinko- Antitrust Placebo for Consumers Instead of Sound Economics in Refusal-To-Deal Cases*, 35 IIC: *International Review of Intellectual Property and Competition Law*, 788, 802-*et seq* (2004); RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND COMPETITION LAW, 16 (Joseph Drexel ed., Edward Elgar Publishing Limited 2008); see also Josef Drexel, *Do we always favor dynamic competition over static price competition when excluding Imitation?*, Presentation, 13th EIPIN Congress (March 3, 2012).

⁶² See Keith E. Maskus, *Conclusion to Intellectual Property Rights And Economic Development*, Prepared for the series “Beyond the Treaties: A Symposium on Compliance with International Intellectual Property Law”, organized by Fredrick K. Cox International Law Center at Case Western Reserve University (Revised Draft: February 6, 2000).

⁶³ Section 3(5)(i), The Competition Act, 2002.

⁶⁴ “The existence of IP rights restricts competitive market forces for a set period.”, IP Australia, <http://www.ipaustralia.gov.au/understanding-intellectual-property/why-use-ip/value-of-ip-rights/>.

(5) *Nothing contained in this section shall restrict—*

- (i) *the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under—*
 - (a) *the Copyright Act, 1957 (14 of 1957);*
 - (b) *the Patents Act, 1970 (39 of 1970);*
 - (c) *the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);*
 - (d) *the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);*
 - (e) *the Designs Act, 2000 (16 of 2000);*
 - (f) *the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);*

The section regulates the effect of competition law on IPRs and is positive in nature in the sense that it is only when the situation⁶⁵ stated therein emerges that the competition law, though not failing to follow its due course, will not bother to restrict the happening of the said situation.⁶⁶ However, this is not true.⁶⁷ The section will come into play only if the application of the Competition Act will restrict the right⁶⁸ of a person to restrain infringement of and to impose conditions for protecting his rights⁶⁹ that have been or may be conferred upon him under the specific IP statutes⁷⁰ mentioned therein.

Thus, technically, it is not the IPRs as such that are protected by the virtue of Section 3(5)(i); rather, it is the right to protect IPRs that is protected.⁷¹ The right

⁶⁵ The ‘situation’, here, refers to what has been provided for in the Section 3(5)(i) of the Competition Act.

⁶⁶ This highlights how the way a law is written serves the purpose that it doesn’t expressly seek to serve.

⁶⁷ The following sections of the article will highlight and explain the point.

⁶⁸ The words used in the section are “the right” of a person. It means that the section is talking of a particular right.

⁶⁹ Here and until this stage of the flow of the section 3(5)(i), the Competition Act is referring to the IPRs in a general sense. It is yet not talking about the source of these rights.

⁷⁰ Here, it becomes clear that the rights that are sought to be protected by the right that is allowed unrestricted by the Section 3(5)(i) of the Competition Act are the IPRs that have been or may be conferred by the IP Statutes specifically mentioned therein.

⁷¹ But, this is merely a technicality of the language of section 3(5)(i). The consequence of the operation of this section is inherently linked to the substance of the section.

that is unrestricted by the operation of this section is, in fact, the right to exercise⁷² the IPRs.⁷³

VII. THE DISTINCTION BETWEEN 'EXISTENCE AND 'EXERCISE' OF IPRs - A COMPETITION LAW PERSPECTIVE

The section is supposedly not meant to afford a blanket exemption to IPRs under the Competition Act, 2002. Rather, it demarcates the operational boundary between competition law and IPRs where the transaction in question entails both aspects.⁷⁴

Interestingly, CCI observes that existence of IPRs does not automatically include the right to exert restrictive or monopoly power in a market.⁷⁵ It further, categorically, notes that a practical solution can be based on the distinction between the existence of IPRs and their exercise.⁷⁶ Therefore, according to CCI, if the exercise of IPRs leads to any prohibited anti-competitive trade practice, the same has to be assailed.⁷⁷ This stance of CCI is totally against what the Competition Act's Section 3(5)(i) puts forth. The said provision, in fact, takes the exercise of the IPRs out of the domain of application of the Competition Act.

Per Section 3(5)(i), a person has a right to protect the rights that have been or may be conferred upon him under the specific IP statutes mentioned therein.⁷⁸ This he can do by restraining infringement of his IPRs or imposing certain conditions as may be necessary for the protection of his IPRs. IPRs are, generally⁷⁹, considered to be negative right i.e. the right to stop the third parties from their commercial exploitation. The existence of IPRs, the negative rights, is the exercise⁸⁰ of the IPRs. Therefore, if one is trying to do any of the two things – restraining infringement of IPRs or imposing conditions to protect them-

⁷² The right to exercise IPRs, here, refers to the right to do the things that come under the characterization of the IPRs as negative rights.

⁷³ It is the right to exercise IPRs that the CCI's official Advocacy Booklet on Intellectual Property Rights claims to assailed if the same goes contrary to the principles of competition.

⁷⁴ The legislative realities reflect the proposition.

⁷⁵ CCI Advocacy Booklet Intellectual Property Rights under the Competition Act, 2002.

⁷⁶ *Id.*

⁷⁷ *Supra* note 74.

⁷⁸ For the sake of brevity, let the rights, both, the conferred and those that may be conferred, be called IPRs.

⁷⁹ There are a few academicians who really think that the IPRs being considered as negative rights is a matter of hyper-technicality that crops up from the language of the statutory instruments. In my opinion, IPRs are positive rights when we notice the purpose they serve and the functions they have when they are in operation.

⁸⁰ Canada Competition Bureau, Competition Bureau, Intellectual Property Enforcement Guidelines, paragraph 4.2.1 ("The Bureau defines the mere exercise of an IP right as the exercise of the owner's right to unilaterally exclude others from using the IP. The Bureau views an IP owner's use of the IP also as being the mere exercise of an IP right.").

mentioned in the section, one is deemed to be exercising his IPRs.⁸¹ Therefore, section 3(5)(i) takes away the IPRs and their exercise completely from the domain of competition law; and, this scenario contradicts what has been claimed by CCI in its IPR advocacy booklet.

VIII. SCOPE OF THE PROTECTION- WHAT IS PROTECTED?

As we have seen, the right that has not been allowed to be restricted by virtue of Section 3(5)(i) is only the right to restrain the infringement of or to impose certain restrictions to protect rights that have been conferred or may be conferred by the IP statutes; and, not the rights conferred or that may be conferred by the IP statutes itself. Technically, a person has a right to restrain infringement as per the IP statute. Therefore, for a moment, the use of ‘the’ before ‘right’ can be taken to mean that the right that is sought to be unrestricted is something that has been borrowed from the IP statutes by the Competition Act. But, what the language of the section provides for is not this. Though the operation of the section seeks to address the issue of exercise of IPRs and does recognize a very specific right⁸² to restrain infringement and impose conditions, the language of the section is silent about the source of the said right.

IX. POSITION OF IPRS UNDER SECTION 3(5)(I)

What rights can be protected by exercising the right that is allowed unrestricted under the section have been left to the specific IP statutes by using an arrangement of words “have been or may be conferred upon him under” in the section. According to the Merriam Webster dictionary, the meaning of “conferred” is “to give (as property or characteristic) to someone or something”. It implies that even if certain rights can, generally, be termed as “IPRs”, they will not be, for the purpose of this section, as long as they have not been or may not be conferred under the specific IP statutes mentioned therein. Only the ‘conferment’ has been subjected to the specific IP statutes. The subject matter – “any of his rights” - in relation to which infringement can be restrained and the reasonable conditions can be imposed is rooted in the IP statutes. Hence, per the

⁸¹ Illustration: In case of patents, the section 48 of the Patents Act provides for the right of the patentee and the same include the exclusive right to prevent third parties, who do not have his consent, from the act of making, using, offering for sale, selling or importing for those purposes. Therefore, restraining the infringement of the patent rights under the Patents Act will include not allowing third parties to make, use, etc. the product that is the subject matter of the patent. The restraining the infringement is, thus, the exercise of the IPRs as the IPRs are negative rights. Therefore, technically, only restraining the infringement would amount to exercising the IPRs. If the IPRs were positive rights, then their use by the IPR holder to produce his own goods and services would have constituted exercise of IPRs. But, the later is not the case.

⁸² By using “the” before “right” in the language of Section 3(5)(i).

structuring of the section 3(5)(1), the list of the specific IP statutes mentioned in the section has a very limited purpose.

X. INFRINGEMENT

Infringement, though not defined but provided for in the IP statutes, allows an IPR holder exercise his negative rights. Therefore, if the ‘infringement’ of IPRs in the context of the Competition Act is considered to mean what the infringement is in the context of IP statutes, the right to restrain infringement will be considered to be a negative right for that is what the IPRs are generally taken as. However, per the language of section 3(5)(i), the right to restrain infringement is not, in the context of the application of the section, rooted to the IP statutes.

XI. IMPOSING REASONABLE CONDITIONS

Another aspect that is covered by the unrestricted right allowed under the section is the right of an individual to impose certain restrictions to protect IPRs. Normally, imposition of reasonable terms and conditions are expected by the IP statutes to be imposed in the context of licensing of IPRs. But, as is clear from the language of section 3(5)(i), the Section here is not specifically talking about those reasonable conditions. Therefore, the second subject matter of the right i.e. imposition of reasonable condition is also not rooted in the IP statutes.

The basis of the aforementioned observations is that if the legislative intent was to ground the underlying purpose of everything contained in Section 3(5)(i) in the specific IP statutes mentioned therein, the language would have expressly provided for the same and the phrases like “may be conferred” and “imposition of reasonable conditions” would have been excluded. The syntax of the provision categorically puts forth that the Competition Law did not want to put the IP Statutes totally out of the application of competition law; rather, it wanted to provide for its own arrangement pertaining to IPRs that it thought should be excluded from the Competition Act’s application.

XII. DISCUSSING CERTAIN ASPECTS OF KATARIA CASE

In the case, CCI noted that the Original Equipment Manufacturers (henceforth referred to as “OEMs”) relied on Section 3(5)(i) to state that the restrictions on Original Equipment Suppliers (henceforth referred to as “OESs”) with regard to sales of the OEMs’ proprietary parts to third parties without prior consent would fall within the ambit of reasonable condition to prevent infringement of their IPRs.⁸³ The investment function of IPRs was also raised by the OEMs.⁸⁴ They,

⁸³ *Supra* note 6, ¶ 20.6.15.

⁸⁴ *Supra* note 6, ¶ 20.6.15.

according to CCI, contended that investment in research and development facilities by them lead to manufacturing of the products in question.⁸⁵

CCI in order to determine whether the agreements entered between the OEMs and OESs fell within the ambit of the provisions of Section 3(5)(i) of the Act thought it necessary to frame the following for considerations:

- “a) whether the right which is put forward is correctly characterized as protecting an intellectual property; and
- b) whether the requirements of the law granting the IPRs are in fact being satisfied.”⁸⁶

A. ‘have been or may be granted’ - Interpretation

CCI took into consideration the failure on the part of the OEMs to confirm the status of the IPRs held by them in India along with necessary details to support their contention that Section 3(5)(i) is applicable to their case.⁸⁷ There was no documentary evidence afforded by the OEMs to establish the grant of IPRs in relation to their spare parts, in India.⁸⁸

According to CCI, the applications of Section 3(5)(i) was consequent upon the fulfilment of the condition that IPRs have been conferred or may be conferred upon the “IPR holder”.⁸⁹ It observed that: “*The Commission is of the opinion under section 3(5)(i) allows an **IPR holder** to impose reasonable restrictions to protect his rights ‘which have been or may be conferred upon him under’ the specified IPR statutes mentioned therein. The statute is clear in its requirement that an IPR must have been conferred (or may be conferred) upon the **IPR holder** prior to the exception under section 3(5)(i) being available. Therefore, before the OEMs are permitted to seek the exemption under section 3(5)(i) they must establish that their IPRs have been granted protection (or that the OEMs have initiated the process of being granted protection) under the specified IPR statutes in India*”. [Emphasis Added]

While interpreting ‘which have been or may be conferred upon him under’, CCI concluded that either the OEMS should prove that either their IPRs have been granted protection or the OEMs have initiated the process of being granted protection under the specified IP statutes in India⁹⁰.

⁸⁵ *Supra* note 6, ¶ 20.6.15; It is not understandable what relevance the investment function of IPRs has in the context of application of Section 3(5)(i) of the Competition Act.

⁸⁶ *Supra* note 6, ¶ 20.6.16.

⁸⁷ *Supra* note 6, at ¶ 20.6.16.

⁸⁸ *Supra* note 6, at ¶ 20.6.16.

⁸⁹ *Supra* note 6, at ¶ 20.6.16.

⁹⁰ CCI imposed the geographical limitation on the characterisation of certain rights as IPRs, though the relevant section was silent on this.

This observation is marred by the following two interpretational faults:

First, the word that has been used by CCI is the “IPR holder” which is totally absent from the language of Section 3(5)(i). Can a person upon whom the rights under a specific IPR statute have not yet been conferred and may be conferred be called an ‘IPR holder’? No. A person becomes an IPR holder only after the rights have been conferred upon him under the specific IP law.⁹¹ The issue under consideration here is not whether the IP has been registered for the creator or the owner to be declared as an IPR holder; the issue is whether IPRs have been conferred upon a person by the application of any specific IP statute.

Second, CCI mistook the right that “may be conferred” to mean that the party seeking application of Section 3(5)(i) should have initiated the process of being granted protection. This interpretation is inherently wrong as it provides no line of thinking or argument that made CCI interpret “the right that may be conferred” into “therefore, before the OEMs are permitted to seek the exemption under Section 3(5)(i) they must establish that their IPRs have been granted protection (*or that the OEMs have initiated the process of being granted protection*) under the specified IPR statutes in India.” [Emphasis applied] The Section does not, in any way, require that the person evoking Section 3(5)(i) must have initiated the process of being granted the protection under the IP statute to bring his rights under the purview of “may be conferred”. The language of the provision does cover a situation in which certain rights under the specific IP statutes may be conferred upon a person even if he hasn’t applied for it. It is not a procedural requirement; rather, it is a substantial requirement, in the context of the Competition Act.⁹²

XIII. LACK OF EVIDENCE

CCI also differed from OEMs in relation to the latter’s characterisation of certain rights as IPRs.⁹³ OEMs could not submit before CCI sufficient evidence to establish the former’s claim over a particular type of IPRs. CCI observed that OEMs did not provide the details of the spare parts corresponding to whatever registration, done or pending, details were provided by them in relation to designs and patents. CCI found it impossible to relate the rights claimed by the OEMs to individual spare parts. Hence, the denial of the exemption seems valid from this perspective.

⁹¹ See the proviso to Section 11 A (7) of the Patents Act 1970 mentioning the term ‘patent holder’.

⁹² CCI’s only discretion, in this regard, is to acknowledge whether the said IPRs have already been or may be conferred upon a person.

⁹³ *Supra* note 6, at ¶ 20.6.16.

XIV. TERRITORIAL NATURE OF IPRS

CCI noted that the OEMs contended that the some of the IPRs in question were validly held by their overseas parent companies and were transferred through technology transfer agreements. Responding to this submission of OEMs, CCI stated that the IPRs were territorial in nature and therefore, could be vested upon the IPR holder only in a given jurisdiction. Though, on one hand, this observation of CCI totally discarded the relevance of those IP-related international instruments which mandated the internationalisation of certain aspects pertaining to IPRs, it also highlighted that the contracts could not make universal what is territorial in nature; especially, in the context of competition law that specifically stressed on the need of the conferment of the IPRs as per the Indian IP statutes. CCI observed that the OEMs held, under a TTA, the right to commercially exploit IPRs that was held by their parent companies and not the IPR right itself.⁹⁴ Therefore, also, the application of Section 3(5)(i) was denied by CCI.

If the Indian IP statutes provide for the recognition of IPRs vested upon a person abroad, it will be mandatory for CCI to consider it favourably for the purpose of application of Section 3(5)(i). CCI held that only the IPR enforcement agencies in India, and not CCI, would be in a position to decide if an IPR registered abroad would fulfil the legal and technical requirements of the Indian IP statutes to be considered as an IPR worthy of being the subject of Section 3(5)(i). CCI, however, did, in theory and prospectively, usurp the jurisdiction if it had evidence before itself with regard to the fact that the foreign-registered IPR in question is validly recognized as per the Indian statutes or where such recognition was imminent.

XV. CEASE TO SUBSIST

CCI, while considering whether the OEMs enjoyed copyright protection even after they did not register their engineering drawings and technical manuals of their spare parts under the Section 2(o)⁹⁵ of the Copyright Act⁹⁶, held that the copyright over the designs registered under the Designs Act⁹⁷ or the designs that are capable of getting registered under the Design Act, but were not registered, shall cease to exist once the said design has been applied more than 50 times by the application of industrial process by the copyright holder or its licensee.⁹⁸

CCI, in response to the contention of the OEMs that the provision of section 15(2) of the Copyright Act will be applicable to protect the copyright of the OEMs in the spare parts because of the application of the International Copyright

⁹⁴ *Supra* note 6, at ¶ 20.6.17.

⁹⁵ Definition of 'literary work' under the Copyright Act.

⁹⁶ *Supra* note 6, ¶ 20.6.18.

⁹⁷ Designs Act, 2000.

⁹⁸ *Supra* note 6, ¶ 20.6.19.

Order, 1999 implementing the provisions of the Berne Convention, read with the section 33 of the Copyright Act⁹⁹, held that the CCI didn't need to venture into the applicability of section 15 of the Copyright Act to the case of the OEMs in order to determine the applicability of section 3(5)(i) of the Competition Act to the agreements between OEMs and OESs.¹⁰⁰ CCI went ahead to interpret "*impose reasonable conditions, as may be necessary for protection of any of his rights*" and held that the concept of protection of an IPR was qualified by the word "necessary".¹⁰¹ This interpretation of CCI is not justified because it is not the concept of the protection of an IPR that is qualified by the word 'necessary', it is the reasonable conditions that ought to be 'necessary' for the protection which is an independently absolute concept under Section 3(5)(i). On the basis of its interpretation of the phrase, CCI stated: "*So the question that one should ask is: can the IPR holder be able to protect his IPR, even if such restriction was not present*".¹⁰² This question is also wrong because the phrase in the Section does not read: "if necessary for the protection". Instead, the phrase is "as may be necessary for protection". The protection is absolute in the context of the Section. Therefore, the word 'necessary' doesn't qualify the word 'protection'; but, it does qualify the phrase "impose reasonable conditions" and thus, qualifying the words 'reasonable' and 'conditions', collectively. So, the questions that CCI should have considered are: Are the conditions that are sought to be imposed by the person wanting to apply Section 3(5)(i) reasonable? And, Are the reasonable conditions so imposed necessary for the protection of the IPRs?

XVI. PRODUCTS DID NOT COMPRISE THE IPRS

CCI observed that the products manufactured by OEMs and sold by the OESs are finished products and the IPRs in them could be protected contractually.¹⁰³ Interestingly, this is what the OEMs were allegedly doing imposing restrictions on sales to protect the IPRs; but, CCI failed to articulate it. According to CCI, OEMs were not to impose sale conditions on the OESs to protect the IPRs in the finished products. This observation of CCI is wrong for the reason that the scope of Section 3(5)(i) does include such contracts and the issue before CCI was to check the validity of such contracts that were imposing sale restrictions under the pretext of protecting IPRs in the finished products.

CCI held that "selling a diagnostic tool in the open market does not comprise the IPRs of the OEMs in such tools and equipment"¹⁰⁴ Regardless of the fact that the Section does, technically, include within its scope the scenario where the sales restrictions can be imposed in order to protect IPRs, the handling of the

⁹⁹ *Supra* note 6, at ¶ 20.6.20.

¹⁰⁰ *Supra* note 6, at ¶ 20.6.21.

¹⁰¹ *Supra* note 6, at ¶ 20.6.21.

¹⁰² *Supra* note 6, at ¶ 20.6.21.

¹⁰³ *Supra* note 6, at ¶ 20.6.21.

¹⁰⁴ *Supra* note 6, at ¶ 20.6.22.

issue by the CCI is not understandable when it held that the restrictions imposed upon the OESs from selling spare parts directly into the were not within the ambit of exemptions granted by Section 3(5)(i). By the implication of the Section, if an agreement causes protection of IPRs and anti-competitive behaviour, it will still be allowed to get into effect.

XVII. CONCLUSION

The limited analysis of Section 3(5)(i) of the Competition Act in this article clearly shows that the highly uncertain contours through which the competition law has been framed are atrocious and unable to regulate the anti-competitive exercise of IPRs. It also highlights certain faults in the CCI's interpretation of the law. The aforementioned analysis also shows how skewed are the objectives of the dynamics of the interface between competition law and IP law.

IPRs should not be used in a way that violates competition law.¹⁰⁵ The provisions contained in the TRIPS also aim at preserving competition in the market.¹⁰⁶ Intellectual property rights have to take account of the public interest.¹⁰⁷ The judiciary has the responsibility to discharge the great burden of just interpretation of the law that has been formulated by law-makers and to analyse the new dimensions.¹⁰⁸

¹⁰⁵ Orange Book Standard case KZR 39/06 May 6, 2009 [BGH].

¹⁰⁶ Articles 8.2 and 40 TRIPS.

¹⁰⁷ Paramjeet Singh Berwal, Comment *The Need to balance moral rights and public utility*, in WIPO Magazine Letters and Comments. (April 2008).

¹⁰⁸ Paramjeet Singh Berwal, *Articles 3(a) and 3(b) of the SPC Regulation - An Analysis*, 36(1) EUROPEAN INTELLECTUAL PROPERTY REVIEW 29, 37-38 (2014).